IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-703

MOTION FILED

APR 21 1972

UNITED STATES OF AMERICA,
Appellant,

v.

FIRST NATIONAL BANCORPORATION, INC. and
THE FIRST NATIONAL BANK OF GREELEY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MOTION OF THE NEW YORK STATE BANKING DEPARTMENT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Supreme Court, U.S.
FILED
MAY 22 1972
MICHAEL RODAK, JR., CLERK

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The New York State Banking Department respectfully moves, pursuant to Rule 42 of this Court's Rules, for leave to file the annexed brief *amicus curiae*. Counsel for the appellant has consented to the filing of the brief; counsel for the appellees has withheld such consent. Both letters have been filed with the Clerk of the Court.

The New York State Banking Department is the agency of the State of New York charged by law with regulating New York State banks and passing upon bank acquisitions and mergers by bank holding companies in New York State. In so doing, the Banking Department has for many years relied heavily upon and applied the doctrine of potential competition which is at issue herein.

We believe that our experience in the application of standards of potential competition, as evidenced by the specific cases described in our brief, is deep and broad. We also believe that what has occurred in New York is relevant to potential competition questions faced in many other states, even those with a different banking structure than ours, and that the decision in this case will affect such states as well as New York. Finally, we would suggest that the Banking Department's accumulated experience provides a significant factual pattern that can assist the Court in resolving the legal issues presented in this case.

Respectfully submitted,

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New York State Banking Department

on behalf of:

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(51468)

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The Superintendent of Banks of the State of New York, purportedly acting on behalf of the New York State Banking Department,[1] seeks leave of this Court to intervene as *amicus curiae* in support of the position of the Appellant. The asserted basis of intervention is Mr. Dentzer's interest in preserving a competitive banking structure in the state among

[1] Appellee is advised that the Superintendent, Mr. Dentzer, did not seek the concurrence of the New York State Banking Board in filing the motion, nor was the consent of the state's Attorney General to such filing obtained.

those banks subject to his supervision, and the utility to that end of the preservation of "potential competition" (see *e.g.*, Brief as Amicus, p. 5).

But whatever parameters this Court places upon the theory of potential competition under section 7 of the Clayton Act, as that statute is applied generally or, specifically, to banking, Mr. Dentzer will in no way be inhibited in his application of the completely distinct statutory scheme which the State of New York has adopted as appropriate to the regulation of proposed bank affiliations.[2] Mr. Dentzer's approval of a proposed affiliation under those regulations is an essential predicate to even the possibility of an inquiry under the Clayton Act with respect to banks subject to his supervision. If it is his belief that the public interest in New York requires the application of strict criteria relative to potential competition, he requires no support from the Courts under the Clayton Act in order to implement that policy. His interests, therefore, could not be adversely affected by any action which this Court might take in the present case, thus his appearance as amicus without consent of both parties is therefore inappropriate. *Northern Securities Co. v. United States*, 191 U.S. 555, 556 (1903). See also, *United States v. Winkler-Koch Engineering Co.*, 209 F.2d 758 (C.C.P.A. 1953). Cf., *Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970), *Cory Corp. v. Sauber*, 267 F.2d 802 (7th Cir. 1959).

Indeed, Mr. Dentzer's application serves to raise doubt as to any necessity for a broadly based, Court-administered potential competition standard in the regulated industry of banking, as well as to underscore the limited utility of such a standard in that industry. There are fifty "Mr. Dentzers" in the United States, as well as three Federal regulatory agencies, passing upon entry into and affiliations within banking. Mr. Dentzer not only has authority to deny affiliations on grounds broader than the Clayton Act, he can also deny *de novo* entry under standards which are similarly broad.

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[2]See Articles III, III-A, and XIII of the New York Banking Law.

Administrative control of entry is a fact which has a direct and critical bearing upon the nature and extent of potential competition in this industry. It is possible for Mr. Dentzer, at the same time that he denies an application involving a proposed affiliation, to offer assurance that alternative methods of entry in the market involved are available under the chartering and branch approval authority of his office. A Court, however, having no direct authority to remove regulatory barriers on alternative avenues of entry, ought properly be more inhibited in foreclosing that method of entry which regulatory authorities have found appropriate. The facts of this case suggest that the "Mr. Dentzers" involved would reject an application for a *de novo* charter in the relevant market, while branching is not permitted in Colorado. Under those circumstances, there clearly does not exist the same potential for future competition as arises when a regulator with chartering authority denies a proposed affiliation based on a perceived need for additional entrants.

Mr. Dentzer concludes his motion: "Finally, we would suggest that the Banking Department's accumulated experience provides a significant *factual* pattern that can assist the Court in resolving the legal issues presented in this case." (Motion, p. 2) (Emphasis added.) But this assertion can only be tested by a detailed comparison of the *facts* in the seventeen selected cases cited by Mr. Dentzer with the *facts* in the present case and, of course, an opportunity to cross-examine on these "facts." An exhaustive inquiry was made at the trial into the facts associated with the Appellees' affiliation. No such inquiry has been made in this case as to any actual or proposed structuring of particular New York markets, and at this stage no such inquiry can be made. Such facts as are available suggest that the cases cited provide no useful precedent on the present appeal. For example:

1. Each of the seventeen cases cited in Mr. Dentzer's brief involved denial of affiliations by regulatory authorities, rather than reversals of such approvals by court action. In seven of the cases (numbers 3, 4, 5, 6, 12, 14, and 15), the disapproving agency was the Federal Reserve Board, the same agency which approved Appellees' affiliation.

2. At least three of the cases (numbers 7-9) appear on their face to have involved actual, rather than potential, competition.

3. Seven of the affiliations (numbers 3, 4, 5, 6, 12, 14, and 15) were denied by the Federal Reserve Board after *approval* by New York authorities.

4. The New York regulatory scheme (free branching, subject to "home office protection," within each of nine separate banking districts) differs markedly from that of Colorado (no branching permitted) and the types of banks involved (billion dollar organizations with numerous offices) are of an entirely different genre than the Appellees or other banking organizations in Colorado.

An appeal is not the occasion for injection of new and untested factual data into the record. One of the "steadying factors in appellate courts" is "a frozen record from below." [3] A long line of federal cases clearly establishes the principle that an appellate court may only consider facts of record. *United States v. Addonizio*, 449 F.2d 100, 103 (3rd Cir. 1971); *Duran v. United States*, 413 F.2d 596, 605 (9th Cir. 1969), cert. denied, 396 U.S. 917; *United States ex. rel. Collins v. Ashe*, 176 F.2d 606 (3rd Cir. 1949); *Stearns v. Hertz Corp.*, 326 F.2d 405, 408 (8th Cir. 1964), cert. denied, 377 U.S. 934; *Watson v. Rhode Island Ins. Co.*, 196 F.2d 254, 256 (5th Cir. 1952). This is so even if matters not before the trial court have been included in the record by stipulation. *Panaview Door and Window Co. v. Reynolds*, 255 F.2d 920 (9th Cir. 1958). *Heath v. Helmick*, 173 F.2d 156 (9th Cir. 1949). Even in the case of an affidavit and papers filed with this Court by a trial judge containing matters which were not in the record before him, this Court has stated (*McClellan v. Carland*, 217 U.S. 268, 283 (1910)):

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[3] Llewellyn, *The Common Law Tradition–Deciding Appeals*, 28 (1960).

> "We shall not enter upon a consideration of these papers because they are not in the record, as the same has been certified to us from the circuit court of appeals as the one upon which it acted. . . .
>
> . . . We must take the case as it is presented here upon the stipulated return to the writ of certiorari on the record as presetned to the circuit court of appeals."

More recently in *Lawn v. United States*, 355 U.S. 339, 354 (1958), reh. denied, 355 U.S. 967, the Court granted a motion to strike a grand jury transcript proffered by the government and portions of the government's brief relating thereto, stating, "we must look only to the certified record in deciding questions presented." We think it is likewise clear that Appellant similarly may not indirectly, through the offices of an "amicus curiae," bring before the Court the materials contained in the brief of Mr. Dentzer.[4]

This raises an additional point. The Court's Rule 42(3) requires that a motion such as Applicant's "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties. . . ." Mr. Dentzer's motion does not meet that requirement, and it is difficult to imagine that he could successfully contend that Appellant has not or will not represent any tangential interest which the New York State Banking Department might have. In fact, circumstances strongly suggest that Mr. Dentzer's motion may be the culmination of a cooperative effort between the Appellant and him to bring before the Court data which Appellant could not appropriately proffer. Mr. Dentzer's brief is essentially an updating of the assertions, arguments, and conclusions of a March, 1970 study by two staff members of the New York Banking Department. On various occasions[5] and through various

[4] See notes 5 and 6, *infra*.

[5] Among such occasions:

(a) On April 28, 1971, Counsel for Appellant purported to summarize, in a Pretrial Brief (pp. 17-18), the "facts" and conclusions of the study.

(continued)

methods—not, however, including an evidentiary offering which would have subjected the study to critical analysis, cross-examination and rebuttal—Appellant referred to, directed attention to, and made available to the Court below copies of the same study. It seems clear that, to the extent that Mr. Dentzer has a position which ought be represented in this matter, he has a resourceful, capable and sympathetic advocate in the Appellant.[6] Where the parties are represented by competent counsel, and consent has not been given, the

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(b) After the close of the record below, on May 24, 1971, Appellant filed a Supplemental Brief and an Appendix thereto, in which counsel devoted four full pages (i-iv) to a detailed discussion of various facts and conclusions allegedly contained in the study.

(c) On May 26, 1971, counsel for Appellant addressed a letter to the presiding judge enclosing copies of excerpts from six publications. The letter closed with a reference to the study and indicated that a copy thereof had already been furnished to the Court. Counsel for Appellees, who was not previously advised as to the *ex parte* communication of the study, took exception in a letter dated June 15, 1971, which concluded:

> "If the United States Department of Justice is unable, or at least unwilling, to make disciplined responses to the instructions of the Court and the rules of evidence, Defendants ought to be allowed similar freedom and the orderly pursuit of justice will sink into aimless anarchy."

Both letters referred to are reprinted in the Appendix hereto.

[6]Circumstances suggest that Appellant may also have taken unusual measures in this Court to make possible Mr. Dentzer's filing. Initially, Mr. Dentzer attempted to lodge his *amicus* brief as of right on Friday, March 31, 1972, just one week before Appellant's time for filing its brief in chief on this appeal was to expire. Under Rule 42, the time for filing an *amicus* brief expires concurrently with the time for filing the brief in chief which it supports. Upon Appellees' objection, the Clerk of the Court properly refused to accept the brief for filing. On the following business day, April 3, 1972, Appellant applied for a 30 day extension of time within which to file its brief. Although Appellant, in requesting the extension, alleged difficulties with the record and scheduling with the *Falstaff* case, the grant of the extension had the "incidental" effect of permitting the Applicant additional time within which to move to re-file.

need of assistance in presenting the issues should not be assumed. *Northern Securities Co. v. United States*, 191 U.S. 555 (1903).

In summary, the granting of Applicant's motion would improperly introduce complex and untested factual material which, without adequate analysis, would be prejudicial to Appellees. Applicant has asserted no interest which warrants his appearance, and such general interest as he might be presumed to have is fully and adequately represented by counsel for Appellant. Under all these circumstances, the application should be denied.

Respectfully submitted,

Eugene J. Metzger

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APPENDIX A

May 26, 1971

WBC:CLW:HGS
60-111-900-155

Honorable William E. Doyle
United States Circuit Court
United States Courthouse
Denver, Colorado 80202

Re: United States v. First National *Bancorporation Inc. et al C-2413*

Dear Judge Doyle:

Included in the Appendix to the Plaintiff's Supplemental Brief filed on May 24, 1971 are various citations, including a number of Federal Reserve Bulletins.

It is our understanding that originals of these are on file at the Federal Reserve Bank in Denver and at the Denver Public Library. However, for the convenience of the Court we enclose herewith xerox copies of the following:

American Banker, February 24, 1971, pg. 2
1962 Federal Reserve Bulletin 567
1962 Federal Reserve Bulletin 978
1969 Federal Reserve Bulletin 738
Moody's Industrial Manual 1964, pg. 1402
Salley, "A Decade of Holding Company Regulation in Florida," Monthly Review, Federal Reserve Bank of Atlanta, July 1970

The Kohn and Carlo study on *Potential Competition:* Unfounded Faith or Pragmatic Foresight (1970) cited in the Appendix was also mentioned in our initial *Pre-Trial Brief* (pp. 17-18); we have already furnished the Court with a copy of that study.

Respectfully yours,

WALKER B. COMEGYS

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AREA CODE 202
347-1631

June 15, 1971

The Honorable William E. Doyle
United States District Judge
United States Court House
Denver, Colorado 80201

Re: *United States of America v. First National Bancorporation, Inc. and The First National Bank of Greeley*
Civil Action No. C-2413.

Dear Judge Doyle:

We are in receipt of a document entitled "Plaintiff's Post-Trial Reply Brief."

The document is misnamed. It is, in truth, "Plaintiff's Post Trial Brief, Part II, Vertical Arguments, Due May 24, Dated June 8, 1971."

Absent direction of the Court, we shall not comment on the content of the paper. It is out of time, a "Reply Brief" is unauthorized, the document constitutes Plaintiff's *first*, not second, commentary on its vertical theories, and, finally, it continues Plaintiff's distressing habit of referring to magazine articles, newspaper clippings and the like as if they were Revealed Doctrine for the delectation and direction of Court and counsel. If the United States Department of Justice is unable, or at least unwilling, to make disciplined responses to the instructions of the Court and the rules of evidence,

Defendants ought to be allowed similar freedom and the orderly pursuit of justice will sink into aimless anarchy.

Respectfully submitted,

Eugene J. Metzger

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